



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

OCT - 3 2005

Colleen Castille
Secretary, Florida Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3000

Dear Ms. Castille:

The U.S. Environmental Protection Agency (EPA) Region 4 has completed its review of Florida Administrative Code Chapter 62-303 titled Identification of Impaired Surface Waters, otherwise known as the Impaired Waters Rule (IWR), pursuant to the requirements of Section 303(c) of the Clean Water Act (CWA or Act). The referral issued by the District Court in Florida Public Interest Research Group, et. al. v. EPA, No. 4:02cv408WS-WCS (N.D. Fla.), required EPA to review the IWR to determine whether the IWR, as applied by the State of Florida, revised or modified the State's water quality standards. In its referral, the Court ordered EPA to determine whether the IWR, or any provision thereof, constituted a new or revised water quality standard. EPA filed its determination with the Court on July 6, 2005, finding that there are some provisions of the IWR that constitute new or revised water quality standards. Accordingly, EPA initiated its review of these provisions in accordance with CWA Section 303(c) and its implementing regulations at 40 CFR Part 131. The purpose of this letter is to inform you of EPA's decision to disapprove these provisions on procedural grounds as discussed below.

EPA is required to review State-adopted water quality standards pursuant to the provisions of CWA Section 303(c) and 40 CFR Part 131. Under those provisions, EPA must review new or revised State-submitted water quality standards and make a determination, among others, as to "whether the State has followed its legal procedures for revising or adopting standards; ..." [40 CFR § 131.5(a)(3)]. Toward this end, Florida's Administrative Procedure Act sets forth the following procedures for rulemaking:

Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific. [Fla. Stat. ch. 120.54(3)(a)(1)(2002)]

Although the Florida Department of Environmental Protection (FDEP) has stated that its intent was not to modify Florida's water quality standards,¹ on July 6, 2005, EPA determined that certain IWR provisions constitute changes to the State's standards. See United States Environmental Protection Agency Determination on Referral Regarding Florida Administrative Code Chapter 62-303, Identification of Impaired Surface Waters, July 6, 2005. Consequently, the State's rulemaking procedures, cited above, which require a notice of intended action with an explanation of the purpose and effect of that action, should have been followed with regard to those provisions.

Accordingly, EPA is unable to approve the provisions of the IWR that EPA has determined constitute new or revised water quality standards because the State did not meet the requirements of 40 CFR 131.5(a)(3). EPA is not addressing substantive issues of the IWR in this action. Under EPA's regulations at 40 CFR 131.21, those provisions of the IWR that EPA determined were new or revised water quality standards are not in effect as water quality standards for CWA purposes. EPA has approved the State's existing underlying water quality standards contained in Florida Administrative Code Chapter 62-302 as consistent with the CWA and EPA's implementing regulations. Further, a listing methodology is not a required element of a State's water quality standards under the CWA or its implementing regulations. Therefore, it is not necessary for EPA to promulgate replacement provisions to meet the requirements of the CWA Section 303(c). Section 303(c) requires EPA promulgation only where the State's water quality standards do not meet the requirements of the CWA. Florida's existing water quality standards, without the provisions of the IWR, meet the CWA Section 303(c) requirements for water quality standards.

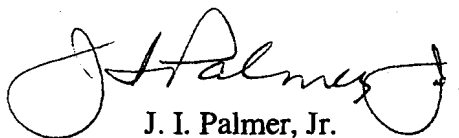
FDEP recently initiated a public rulemaking process to reopen the IWR to identify whether revisions to the IWR are necessary or desirable. If the State decides to adopt provisions of the IWR as new or revised water quality standards, that rulemaking process would resolve the State's compliance with 40 CFR 131.5(a)(3). Any provisions of the IWR that the State decides to adopt as new or revised water quality standards would need to meet the substantive requirements of CWA Section 303(c) and 40 CFR Part 131. We recognize that some of these provisions raise new and complex issues that must be carefully considered, taking into account their effect on all CWA programs.

EPA recognizes the State of Florida's continued leadership as it addresses these difficult technical and regulatory challenges that face all State environmental agencies. EPA appreciates FDEP's level of cooperation, and we look forward to continued

¹ "This chapter is intended to interpret existing water quality criteria and evaluate attainment of established designated uses as set forth in Chapter 62-302, F.A.C., for the purposes of identifying water bodies or segments for which TMDLs will be established. It is not the intent of this chapter to establish new water quality criteria or standards, or to determine the applicability of existing criteria under other provisions of Florida law." --Fla. Admin. Code Ann. r. 62-303.100(3)(2002)(emphasis added).

cooperation and dialogue that would ensure any new or revised standards are consistent with the CWA. If you have any questions concerning this letter or EPA's action, please contact me at 404-562-8357.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. I. Palmer, Jr.", with a large, stylized initial "J" and a flourish at the end.

J. I. Palmer, Jr.
Regional Administrator

cc: Ben Grumbles, Assistant Administrator
Office of Water, EPA
Ann Klee, General Counsel
Office of General Counsel, EPA